

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WILFREDO A. BERMUDEZ,

Plaintiff,

vs.

GREG STORME, et al.,

Defendants.

No. C 08-02236 JW (PR)

ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION;
INSTRUCTIONS TO CLERK

Plaintiff, a California prisoner at the Pleasant Valley State Prison (“PVSP”) in Coalinga, has filed a pro se civil rights action under 42 U.S.C. § 1983 alleging claims against San Mateo County Jail (“SMCJ”) officials for unconstitutional acts committed against plaintiff during his detention at SMCJ pending criminal proceedings. Plaintiff’s motion for leave to proceed in forma pauperis, (Docket No. 4), will be granted in a separate order. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a

1 governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable
 2 claims or dismiss the complaint, or any portion of the complaint, if the complaint “is
 3 frivolous, malicious, or fails to state a claim upon which relief may be granted,” or
 4 “seeks monetary relief from a defendant who is immune from such relief.” Id. §
 5 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v.
 6 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

7 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
 8 elements: (1) that a right secured by the Constitution or laws of the United States
 9 was violated, and (2) that the alleged violation was committed by a person acting
 10 under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

11 B. Legal Claims

12 Plaintiff alleges the following constitutional violations by defendants during
 13 his detention in SMCJ pending criminal state proceedings: 1) defendants used
 14 excessive force on December 11, 2004, when plaintiff refused to return to his cell
 15 and resisted staff; 2) defendants delayed in providing medical attention for the
 16 injuries he sustained from the defendants’ alleged use of excessive force; and 3) in
 17 the disciplinary proceedings that followed which resulted in a guilty finding and
 18 penalties for plaintiff, defendants violated due process by denying plaintiff an
 19 opportunity to present inmate witnesses on his behalf. Liberally construed,
 20 plaintiff’s claims are cognizable under § 1983.

22 CONCLUSION

23 1. The clerk of the Court shall issue summons and the United States
 24 Marshal shall serve, without prepayment of fees, a copy of the complaint in this
 25 matter, all attachments thereto, and a copy of this order upon **Greg Storme, Greg**
 26 **Basinger, Tony Adams, Nino Costa, Deputy Garcia, and Deputy Munoz** at the
 27 **San Mateo County Prison**. The clerk shall also mail courtesy copies of the
 28 complaint and this order to the California Attorney General’s Office.

2. No later than **ninety (90) days** from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the amended complaint found to be cognizable above.

a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810 (2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.**

3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than **forty-five (45) days** from the date defendants' motion is filed.

a. In the event the defendants file an unenumerated motion to dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:¹

The defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown

¹ The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 in the defendant's declarations and documents and show that
 2 you have in fact exhausted your claims. If you do not submit
 3 your own evidence in opposition, the motion to dismiss, if
 appropriate, may be granted and the case dismissed.

4 b. In the event defendants file a motion for summary judgment,
 5 the Ninth Circuit has held that the following notice should be given to plaintiffs:

6 The defendants have made a motion for summary judgment by
 7 which they seek to have your case dismissed. A motion for
 summary judgment under Rule 56 of the Federal Rules of Civil
 Procedure will, if granted, end your case.
 8 Rule 56 tells you what you must do in order to oppose a motion
 for summary judgment. Generally, summary judgment must be
 9 granted when there is no genuine issue of material fact--that is,
 if there is no real dispute about any fact that would affect the
 result of your case, the party who asked for summary judgment
 10 is entitled to judgment as a matter of law, which will end your
 case. When a party you are suing makes a motion for summary
 judgment that is properly supported by declarations (or other
 sworn testimony), you cannot simply rely on what your
 11 complaint says. Instead, you must set out specific facts in
 declarations, depositions, answers to interrogatories, or
 12 authenticated documents, as provided in Rule 56(e), that
 contradict the facts shown in the defendants' declarations and
 documents and show that there is a genuine issue of material
 13 fact for trial. If you do not submit your own evidence in
 opposition, summary judgment, if appropriate, may be entered
 14 against you. If summary judgment is granted in favor of
 defendants, your case will be dismissed and there will be no
 15 trial.

16
 17 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is
 18 advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v.
 19 Catrete, 477 U.S. 317 (1986) (holding party opposing summary judgment must come
 20 forward with evidence showing triable issues of material fact on every essential
 21 element of his claim). Plaintiff is cautioned that failure to file an opposition to
 22 defendants' motion for summary judgment may be deemed to be a consent by
 23 plaintiff to the granting of the motion, and granting of judgment against plaintiff
 24 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per
 25 curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

26 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
 27 plaintiff's opposition is filed.
 28

1 5. The motion shall be deemed submitted as of the date the reply brief is
2 due. No hearing will be held on the motion unless the Court so orders at a later date.

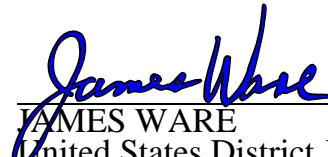
3 6. All communications by the plaintiff with the Court must be served on
4 defendants, or defendants' counsel once counsel has been designated, by mailing a
5 true copy of the document to defendants or defendants' counsel.

6 7. Discovery may be taken in accordance with the Federal Rules of Civil
7 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
8 Local Rule 16-1 is required before the parties may conduct discovery.

9 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must
10 keep the court informed of any change of address and must comply with the court's
11 orders in a timely fashion. Failure to do so may result in the dismissal of this action
12 for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

13 9. Extensions of time must be filed no later than the deadline sought to be
14 extended and must be accompanied by a showing of good cause.

15
16 DATED: August 5, 2008



JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WILFREDO BURMUDEZ,
Plaintiff,

Case Number: CV08-02236 JW

CERTIFICATE OF SERVICE

v.

GREG STORME, et al.,
Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 6, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Wilfredo A. Bermudez V-67000
Pleasant Valley State Prison
P. O. Box 8504
Coalinga, CA 93210

Dated: August 6, 2008

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk